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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 613

JOHN C. VAN HOUTEN, PETITIONER

v.

RAY ARTHUR RALLS AND GERALD L. BYINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not yet reported. The opinion of the court of appeals is reported at 411 F. 2d 940.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1969, and a petition for rehearing was denied on June 20, 1969. The petition for a writ of certiorari was filed on September 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the courts below properly applied the Federal Drivers Act in refusing to retransfer to the State court the present action by a federal employee for damages for injuries sustained by him while at work.

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in pertinent part:

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Federal Drivers Act, 28 U.S.C. 2679(b)–(e), provides in pertinent part:

Subsection (b), 28 U.S.C. 2679(b):[1]

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[1] Subsection (b) was amended by P.L. 89–506, July 18, 1966, 80 Stat. 306, 307, to reflect *inter alia* the new requirement that all tort claims be presented for administrative consideration prior to commencement of suit under the Tort Claims Act. See 28 U.S.C. (Supp. II) 2401(b), and 2672. The amended provision, 28 U.S.C. (Supp. II) 2679(b), which contains some other minor changes, applies to claims accruing six months or more after July 18, 1966, and is therefore inapplicable here.

The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Subsection (c), 28 U.S.C. 2679(c):

The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal Agency.

Subsection (d), 28 U.S.C. 2679(d):

Upon a certification by the Attorney General that the defendant employee was acting within

> the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

The Federal Employees' Compensation Act, 5 U.S.C. 751 *et seq.* (now 5 U.S.C. (Supp. IV) 8101 *et seq.*), provides in pertinent part (Section 757(b)):[2]

> The liability of the United States or any of its instrumentalities under sections 751–756, 757–781, 783–791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a

[2] Title 5 of the United States Code has been recodified, and the F.E.C.A. is now in 5 U.S.C. (Supp. IV) 8101 *et seq.* 5 U.S.C. 757(b), with minor modifications, is now in 5 U.S.C. (Supp. IV) 8116(c).

civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.

STATEMENT

On June 14, 1966, before instituting the present suit, petitioner brought an action for damages in the United States District Court for the District of Nevada under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2671 *et seq.*) against the United States and respondents Ralls and Byington. In that action, petitioner alleged that he was injured while riding as a passenger in an automobile driven by respondent Byington, a government employee acting within the scope of his employment.

The accident allegedly occurred when Byington's car collided with a vehicle being driven by respondent Ralls, who was also in the course of his government employment. It was further alleged that both Byington and Ralls had been negligent.

On January 6, 1967, the district court granted the government's motion for summary judgment, on the ground that, because petitioner was also a government employee acting within the scope of his employment at the time of the accident, his exclusive remedy against the United States is under the Federal Employees' Compensation Act, 5 U.S.C. 751 *et seq.* (now 5 U.S.C. (Supp. IV) 8101 *et seq.*). Accordingly, on January 10, 1967, the court dismissed petitioner's action against respondents Ralls and Byington for lack of federal jurisdiction.

In the meantime, however, on November 29, 1969, petitioner filed the present action against respondents Ralls and Byington in a Nevada state court, asserting essentially the same factual allegations. That action was then removed to the United States District Court for the District of Nevada pursuant to the Federal Drivers Act, 28 U.S.C. 2679. In seeking removal, Ralls and Byington asserted that they were acting in the scope of their government employment at the time of the accident, and that, pursuant to the Federal Drivers Act, petitioner's tort remedy, if any, lay against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b). But since suit under the Federal Tort claims Act was barred by the exclusivity provisions of the Federal Employees Compensation Act, 5 U.S.C. (Supp. IV) 8101 *et seq.*, petitioner moved to remand to the State court the case against respondents Ralls and Byington.

Ralls and Byington then cross-moved for dismissal of the action on the ground that the Drivers Act immunized them from all personal liability arising out of driving in the course of their government employment. The district court agreed with this argument and dismissed the action. It ruled that to deprive Ralls and Byington of the protection of the Drivers Act would be

> to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpreta-

tion, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.

On appeal, the court of appeals affirmed.

ARGUMENT

The decisions below correctly apply the clear mandate of the Federal Drivers Act and there is no conflict with the decision of any other court of appeals. Further review is, therefore, not warranted.

1. The Federal Drivers Act was enacted in 1961 to protect government drivers from the threat and burden of suits and judgments resulting from driving for the government. See H. Rep. No. 297, 87th Cong., 1st Sess.; S. Rep. No. 736, 87th Cong., 1st Sess. The statute accomplishes that purpose by immunizing individual drivers from liability arising out of driving in the course of their government employment, and by limiting the plaintiff to his remedy against the United States under the Tort Claims Act. In refusing to remand the present litigation to the State courts, the decisions below properly effectuate that statutory purpose and are in accord with *Noga* v. *United States* 411 F. 2d 943 (C.A. 9), certiorari denied, October 13,

1969, No. 377, Oct. Term, 1969;[3] *Gilliam* v. *United States*, 407 F. 2d 818 (C.A. 6);[4] and *Vantrease* v. *United States*, 400 F. 2d 853 (C.A. 6).

2. Petitioner contends that, notwithstanding the above decisions, he should be allowed, under the remand provision of the Drivers Act, to pursue his separate action against the respondent federal employees in a State court. He urges that a remand is proper where, as here, he has no tort remedy against the United States because of the exclusivity of his Federal Employee Compensation Act remedy. But, as the court below (as well as the court in *Vantrease, supra*) correctly held, the remand provision "is applicable only where the Government driver is found to have been acting outside the scope of his employment at the time of the accident" (Pet. App. A., p. 3).

The Tort Claims Act expressly limits federal liability to claims caused by negligence on the part of a government employee "while acting within the scope of his office or employment." 28 U.S.C. 1346(b). If the employee was not so acting at the time of his alleged tort, the Tort Claims Act is inapplicable and the court would lack jurisdiction to entertain the claim against the United States. *United States* v. *Eleaser* 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903.

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[3] Because the issue in *Noga* was closely related to those raised in the present petition, we respectfully refer the Court to the arguments set forth in our Brief in Opposition in that case, a copy of which has been furnished to counsel for the petitioner herein.

[4] The decision by the court of appeals reversed the district court's *Gilliam* decision on which petitioner relies (Pet. 8-9).

The Federal Drivers Act takes into account the contingency that the driver may have been acting outside the scope of his employment at the time of the accident, and provides for a remand to the State court in that situation (28 U.S.C. 2679(d)). In accord with this purpose, the remand provision of subsection (d) can properly be invoked only in that limited situation. Where the Tort Claims Act remedy is "not available" for some reason other than lack of scope of employment, the driver is not personally liable and a remand to the State courts would serve no purpose.

Since, in the instant case, the non-availability of the Tort Claims Act remedy to petitioner stems from the exclusivity provisions of the Federal Employers Compensation Act, 5 U.S.C. (Supp. IV) 8101 *et seq.*, rather than from the respondents' having acted outside the scope of their employment, the latter still enjoy the protection of the Drivers Act and the remand provision is inapplicable.

This does not mean that petitioner is left without a remedy. Congress intended the Compensation Act to replace entirely any tort liability of the United States to covered employees; in return the employees receive as a fair substitute the administrative compensation remedy which "would afford employees and their dependents a planned and substantial protection." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23.[8] Despite

[8] This Court has noted the advantages to a claimant of the comprehensive system of benefit payments under the Compensation Act. *Johansen* v. *United States*, 343 U.S. 427, 440–441. Payments under the Compensation Act may exceed $1,750 per month to a disabled federal employee. 5 U.S.C. 8112.

petitioner's assertion to the contrary, there is no constitutional bar to the replacement of a common law tort action by statutory workmen's compensation benefits. *New York Central R.R.* v. *White*, 243 U.S. 188.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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